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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 398

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent.

REPLY MEMORANDUM OF HAZEL-ATLAS GLASS COMPANY, ON ITS PETITION FOR WRIT OF CERTIORARI

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HENRY R. ASHTON,
Counsel for Petitioner.

December, 1943

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It may be helpful to comment briefly upon some statements in respondent's brief.

1. *"The Clarke article, as published, was entirely true"* (resp. brief, pp. 4, 21, 23).

It was not true. The statements in it were contrary to the evidence in the record and the findings of the trial court.

Hartford was attempting to obtain broad claims in the Patent Office for Peiler, asserting that he was a pioneer inventor of "gob" feeding, especially with a plunger feeder. So the Clarke article was written and published by Hartford "under the name of some apparently unprejudiced authority" (R. 60), and used in the Patent Office "to obtain claims, covering the broad ideas" (R. 57) in the patent.

The Clarke article was used also in the third circuit court of appeals to sustain the Hartford contention that

Peiler was entitled to broad claims because he was a pioneer inventor, respondent's brief here (p. 24) admitting that the article was used "for the purpose of showing that the Peiler invention 'broke the Owens domination'". Hartford argued, and the majority opinion of the court of appeals found, that the Peiler patent, describing a plunger feeder which shaped the mold charges in suspension, created the commercial "gob feed" industry, breaking the prior "suction feed" domination of Owens. The article purported to prove this, by stating that the use of "gob feeders" commenced in 1917 with "Hartford-Fairmont and Howard feeders" (R. 196), and that there was nothing important in "gob feed" until Peiler and the Hartford Company came into the field.

But the facts were, as found by the trial court, *Hartford* v. *Hazel*, 39 F. 2d 111, and not denied but ignored by the majority opinion of the court of appeals, that the Brookfield patent of 1901 (owned by Hazel), for a *plunger* feeder, described "feeding separate 'gob' or measured charges of glass to molds" (*Hartford* v. *U. S. Glass*, 2 F. 2d 111), as did other patents earlier than Peiler (39 F. 2d 114); that Peiler and the Hartford Company from 1914 to 1922 worked on and put out only "paddle" and "paddle-needle" feeders, impracticable and long since obsolete, in which *a paddle* moved the molten glass from the furnace over a dam into the feeder; that Howard in 1917, Tucker and Reeves in 1918 and others prior to 1922 put out successful *plunger* feeders of present day type; and that in November 1922, Hartford discarded its unsuccessful *paddles* and for the first time put out a *plunger* feeder of present day type. Indeed, the Peiler patent application was not filed until 1919.

This record of Hartford failure until in 1922 it adopted the plunger feeder of early patents and of such feeder manufacturers as Howard, Tucker & Reeves and Miller was contrary to the Clarke article's representations in effect, adopted by the majority opinion of the third circuit court of appeals, that Peiler invented the idea of practical plunger feeding, and that he and the Hartford Company were responsible for the commercial use of "gob" feed.

Respondent's brief (pp. 22, *et seq.*) attempts to justify the Clarke article as being based on the union reports, but it is apparent from respondent's own presentation that this is not so. For example, the article talks about "Gob Feeders", although this expression is not used in the union reports (R. 12). Again, the article contains a highly technical, patent jargon sort of description of feeder operation, upon which Judge Buffington much relied, quoting it twice as a description by a union official* in language of "keen accuracy" (59 F. 2d. pp. 404, 407), the description being:

> "Instead of employing a stream of glass which collected in the mold until the desired mold charge had accumulated, these new feeders cut off a suspended chunk or gob of glass which was pre-formed during suspension to correspond to some extent, at least, to the shape of the mold cavity in which it was to be received."

The gist of the Peiler patent claims was *shaping in suspension*, so obviously this language was most helpful to the Hartford position. But the only words Hartford can find in the union records in connection with this are "the gob process of dropping glass into a mould" and "the Hartford-

*This was in fact a Hartford patent attorney, Hatch.

Fairmont flow" (R. 231), which describe the admittedly old "gob" and "flow" methods, and not the alleged new invention of *shaping in suspension*. Again, the chart accompanying the article (R. 200) purported to show that the Peiler *plunger* feeder was responsible for the great increase in gob feed, from nothing in 1917 to four million gross in 1922, but this was untrue, because the first Peiler *plunger* feeder was installed in November, 1922, following the long since obsolete *paddle* feeders, while the plunger feeders of Howard, Tucker & Reeves and others had been operating for many years prior.

Respondent's brief here (p. 5) says that the Hazel brief in the court of appeals did not challenge the Clarke article "except to criticize a *chart** appended to it on the ground that it was 'misleading' and 'not competent evidence' (Opinion, R. p. 244)". But it was this chart of "gob feed" production curves which was the very heart of the article, "the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print" (Hartford letter to Owens, April 19, 1926, R. 59).

The falseness of the Clarke article and chart appears clearly, and most importantly, from contrasting the opinions of the trial judge and dissenting Judge Woolley, who were not influenced by the Clarke article, with the opinion of Judge Buffington, who believed it.

2. *There was no laches by Hazel.*

Respondent's brief (pp. 26-29) argues that there was laches by Hazel.

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*Italics in quotation.

The facts are that prior to the trial in the district court Hazel had some hearsay information that Hartford was responsible for the Clarke article;* that after Judge Buffington's opinion Hazel tried to obtain sufficient evidence for petition for rehearing but was prevented by Hartford; and that Hazel was compelled to take a license upon what appeared very harsh terms, namely, the payment of one million dollars for past infringements, agreement to pay future royalties which might have amounted to much more than Hazel would receive for its license to Hartford, and other onerous provisions.

Respondent's brief correctly says that the agreement provides for a six months option to Hazel to cancel (p. 29). But that option can not be exercised so long as respondent can enforce against Hazel the third circuit decision sustaining the Peiler patent, because Hazel feeders are dominated by that patent.

Respondent's brief (p. 30) suggests that the motive for the Hazel attack upon the third circuit decision was because of an impounding order on May 9, 1941, in the antitrust case of *U. S.* v. *Hartford, et al.*, now on appeal to this Court. But not only is the motive immaterial—the real question being whether the Hazel, and the Shawkee, attacks are sound—the suggestion is groundless.

Hazel and Shawkee could not have moved earlier, because the documentary and other evidence relied upon here was unknown to them before it was produced by the government in the summer of 1941 in the antitrust suit.

With respect to Hazel, its license under Hartford patents runs only to January 3, 1945. But Hartford now has

*The same information was later unsuccessfully presented by the Shawkee Company to the same court (petitioner's brief, p. 12; Hartford brief here upon the Shawkee petition for certiorari, pp. 27, 28).

very important feeder patents which do not expire before 1954, which patents were ordered issued by the court of appeals of the District of Columbia, *Hartford* v. *Coe*, 87 F. 2d 741. In this last case, the court quotes (p. 743) from Judge Buffington's opinion, including statements "by the union official [President of the Glass Blowers Union]", in the Clarke article.

Thus Hartford is now in the position to use the Clarke article, Judge Buffington's opinion, and the *Coe* decision to support its contention that its patents are entitled to favorable consideration, because it created the commercial plunger feeder industry. But if the third circuit decision is set aside, which is the purpose of the present proceedings by Hazel and Shawkee, not only will the patent sustained in the present suit be invalidated, but the other Hartford feeder patents which are based on such decision will be devitalized accordingly, as it is right that they should be.

3. *The petition for certiorari should be granted.*

Respondent's brief (p. 6) says that the petition should be denied because the decision below in respondent's favor was based on two grounds which were dispositive of the case, in addition to the third ground that the court lacked jurisdiction to correct its decision obtained by fraud practiced on it, after the term had expired. And the brief then asserts that certiorari "is therefore inappropriate". In the petition we have shown that the third ground of decision is (1) in conflict with decisions of the second circuit court of appeals, (2) in conflict with the applicable decisions of this Court, and (3) that it presents a jurisdictional question of great importance to the administration of justice which should be finally settled by this Court (Reasons 1, 2 and 3 for Granting Certiorari, Petition, p. 13). The very

purpose of this Court's certiorari jurisdiction is to provide means for correcting just such errors (Rule 38, par. 5-b), and clearly this jurisdiction is not to be defeated merely because the court below also decided other questions. The erroneous decision of the question of jurisdiction is no less objectionable as a precedent and it is no less desirable that it be reviewed. Upon granting the writ this Court "has the same power and authority as if the case had been carried here by appeal or writ of error" *Federal Trade Com.* v. *Pac. Paper Ass.*, 273 U. S. 52, 66, and may therefore decide all of the issues which the case presents, *Camp* v. *Gress*, 250 U. S. 308, 318; *Rorick* v. *Devon Syndicate*, 307 U. S. 299.

The court below has decided that *a circuit court of appeals is without power to correct its decision obtained by fraud practised on it, after the term has expired.* This should be corrected by this Court, and not allowed to stand as a precedent. And the patently wrong holding below that the court would not reconsider its prior decision that Peiler was a pioneer inventor, on the grounds that Judge Buffington was not influenced by the Clarke article and that Hazel was not diligent, should be reviewed here, because of the great interest of the glassware industry in Hartford patents.

The petition for a writ of certiorari to the circuit court of appeals for the third circuit should be granted.

Respectfully submitted,

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December, 1943.